1999

Park City Municipal Corporation v. Samuel A. Levy : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

PARK CITY MUNICIPAL CORPORATION,	)	
Plaintiff/Appellee,	)	
vs.	)	Appeal No. 990777-CA
SAMUEL A. LEVY,	)	Priority 2
Defendant/Appellant.	)	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF GUILTY OF DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL OR WITH UNSAFE BLOOD ALCOHOL CONCENTRATION IN THE THIRD DISTRICT COURT, PARK CITY DEPARTMENT, SUMMIT COUNTY, STATE OF UTAH, THE HONORABLE PAT B. BRIAN PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This appeal arises from Mr. Levy's conviction for the offense of Driving While Under the Influence of Alcohol and/or Drugs or with Unsafe Blood Alcohol Concentration in violation of Title 10, Chapter 6, Section 44 of the Municipal Code of Park City, Utah. The Utah Court of Appeals has jurisdiction of this matter pursuant to Rule 3 of the Utah Rules of Appellate Procedure and Utah Code Ann. Section 78-2a-3(2)(e) (1953 as amended).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellee (hereafter referred to as "Park City") accepts the Statement of Issues and Standard of Review set forth in Appellant's Brief.

CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

The following Rules and Statute are determinative or of central importance to the appeal:

1. Rule 4-404(10) of the Utah Rules of Judicial Administration:

Calling additional jurors. If there is an insufficient number of prospective jurors to fill all jury panels, the court shall direct the clerk of the court to summon from the qualified jury list such additional jurors as necessary. The clerk shall make every reasonable effort to contact the prospective jurors in the order listed on the qualified jury list. If after reasonable efforts the clerk fails to contact a juror, the clerk shall attempt to contact the next juror on the list. If the clerk is unable to obtain a sufficient number of jurors in a reasonable period of time, the court may use any lawful method for acquiring a jury.

2. Rule 18(e)(4) of the Utah Rules of Criminal Procedure:

the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted or employed by the state or a political subdivision thereof;

3. Utah Code Annotated §41-6-44(2)(a)(i) (1999):

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:
(i) has sufficient alcohol in his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater;

4. Utah Code Annotated §41-6-44(2)(a)(i) (1998)
(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:
(ii) has a blood or breath alcohol concentration of. 08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control;

STATEMENT OF THE CASE

Mr. Levy is charged with Driving While Under the Influence of Alcohol and/or Drugs or with Unsafe Blood Alcohol Concentration on February 6, 1999. Mr. Levy was

convicted at a jury trial on August 11, 1999. A Notice of Appeal was filed on September 8, 1999.

STATEMENT OF THE FACTS

1. Defendant Samuel A. Levy ("Mr. Levy") is charged in an Information filed by Park City Municipal Corporation with Driving While Under the Influence of Alcohol and/or Drugs or with Unsafe Blood Alcohol Concentration on February 6, 1999. (R. 15-16).

2. Defendant plead not guilty to the above charges and a jury trial was commenced on August 11, 1999. (R. 9, 11, 57).

3. There were originally 20 prospective jurors on the Jury List to hear this case. However, as a result of jurors failing to appear or being excused from jury service before trial, 11 prospective jurors were initially seated. (R. 57, Tr. 130- Appendix 1).

4. As a result of the voir dire examination, 3 of the 11 jurors were excused for cause leaving only eight prospective jurors on the jury panel. (R. 57, Tr. 130, Tr. 79, Lines 15-25 through Tr. 80, Lines 1-10- Appendix 1).

5. With only eight prospective jurors remaining on the jury panel there was insufficient jurors to allow an eight-person jury after the exercise of three preemptory challenges by both the prosecution and defense. Defense counsel was unwilling to waive one preemptive challenge and the prosecution was unwilling to waive two preemptive challenges so the existing panel could be utilized. (Tr. 79, Lines 15-25 through Tr. 80, Lines 1-10).

6. Rather than call a mistrial, the trial judge instructed the bailiff to "go to the clerk's office, go to the sheriff's office, go over to the industrial building and you bring me four more jurors post haste." (Tr. 37, Lines 11-15).

7. The bailiff returned with four additional prospective jurors, all of whom worked in the Summit County Justice Center: Jurors 12 and 13, Summit County Justice Court Clerks; Juror 14, a newly hired Summit County Dispatcher; and, Juror 15, a Summit County Deputy Sheriff. (Tr. 39, Line 16; Tr. 41, Line 12; Tr. 42, Lines 4-7; Tr. 42, Lines 18-23).

8. Juror 15, the Summit County Deputy Sheriff, was excused for cause having dealt with the arresting officer and prosecution witness in a professional setting and having formed an opinion as to his credibility. (Tr. 62, Lines 9-16; Tr. 63, Lines 11-14).

9. The remaining additional jurors indicated they had not dealt with the arresting officer and prosecution witness before and did not have any opinions as to his creditability. (Tr. 61, Lines 9-25 through Tr. 62, Lines 1-8).

10. The two Justice Court Clerks were acquainted with both the prosecutor and defense counsel because of their work in and around the Courthouse and were not socially involved with either attorney. (Tr. 43, Lines 15-25, Tr. 44, Lines 1-8).

11. Juror 13, Summit County Dispatcher, was recently hired and did not know either counsel and did not dispatch for the Park City Police Department where the arresting officer and prosecution witness was employed. (Tr. 48, Lines 1-7, Tr. 61, Line 23 through Tr. 62, Lines 1-4).

12. After the voir dire examination was completed, defense counsel challenged for cause Juror 7 and Jurors 12, 13 and 14 who were the additional jurors located by the bailiff. (Tr. 95, Lines 22-25).

13. Defense counsel did not use his preemptory challenges on the additional jurors but instead used his preemptory challenges on Jurors 1, 4 and 8. (R. 57, Tr. 130-Appendix 1).

14. During the trial, the prosecution objected to defendant's expert, Dennis Crouch, testifying as to the defendant's blood alcohol level at the time of driving using extrapolation based on the number of drinks, timing of the drinks and the absorption/metabolic rate of alcohol. (Tr. 106, Lines 5-25).

15.After reviewing Utah Code Ann. §41-6-44(2)(a)(i) the trial court concluded that the "statute clearly says that the question's not what the breathalyzer test was at the time of the stop, but what a breathalyzer test was within two hours of the stop". The trial court sustained the prosecution's objection to admissibility of expert testimony regarding defendant's blood alcohol concentration at the time of stop based on the absorption and metabolism of alcohol. (Tr. 119, Lines 1-6; Tr. 127, Lines 1-6).

16. At Mr. Levy's attorneys' request, the trial judge requested the jury to determine if Mr. Levy is guilty of both Driving Under the Influence of Alcohol and Driving with a Blood Alcohol Content of .08 or greater. (Supp. Tr. 2, Lines 13-25 through Supp. Tr. 3, Lines 1-8; Supp. Tr. 8, Lines 18-25 through Supp. Tr. 9, Lines 1-10).

17. The jury found Mr. Levy guilty of both Driving Under the Influence of Alcohol and Driving with a Blood Alcohol Content of .08 or greater by underlining both verdicts. (R. 38).

SUMMARY OF ARGUMENTS

1. The trial judge acted properly pursuant to Rule 4-404(10) of the Utah Rules of Judicial Administration when he directed the bailiff to locate additional jurors when the jury panel was reduced to a number insufficient to seat a four-person jury and allow each attorney to exercise three preemptory challenges. Any alleged improprieties were waived when Mr. Levy's attorney failed to exercise his preemptory challenges on the jurors unsuccessfully challenged for cause.

2. The trial judge properly disallowed expert testimony on the absorptive and metabolic rate of alcohol based on Utah Code Ann. §41-6-44(2)(a)(i)(1999) which Mr. Levy's attorney represents is the applicable statute. Even if the 1998 statute governed, any error in disallowing the expert testimony was harmless because the jury found Mr. Levy guilty of both Driving While Under the Influence of Alcohol and Driving with Unsafe Blood Alcohol Concentration.

ARGUMENT

I.

THE TRIAL COURT COMPLIED WITH UTAH LAW REGARDING JURY SELECTION AND DEFENDANT WAIVED ANY ALLEGED IMPROPRIETY.

The procedure for jury selection, qualification and service is set forth in Rule 4-404 of the Utah Rules of Judicial Administration (1992). This Rule specifically provides

for the calling of additional jurors if there are an insufficient number of prospective jurors to fill the jury panel. Subsection (10) of said Rule provides:

> (10) *Calling additional jurors.* If there is an insufficient number of prospective jurors to fill all jury panels, the court shall direct the clerk of the court to summon from the qualified jury list such additional jurors as necessary. The clerk shall make every reasonable effort to contact the prospective jurors in the order listed on the qualified jury list. If after reasonable efforts the clerk fails to contact a juror, the clerk shall attempt to contact the next juror on the list. If the clerk is unable to obtain a sufficient number of jurors in a reasonable period of time, the court may use any lawful method for acquiring a jury. (Emphasis added).

There were originally twenty prospective jurors on the Jury List to hear this case. (See Appendix 1). However, as a result of numerous prospective jurors failing to appear or being excused from jury service before trial, eleven prospective jurors were initially seated. Three jurors were excused for cause during the selection process. This left eight prospective jurors remaining and ten prospective jurors were needed if both counsel exercised their three preemptory challenges. Defense counsel refused to waive one of the defense's preemptory challenges and the prosecution refused to waive two preemptory challenges so the existing panel could be used. (Tr. 79 Lines 15-25 through Tr. 80 Lines 1-10). Under the circumstances, the trial court had to locate additional jurors or continue the trial to a later date with another panel. To utilize the court date and not inconvenience additional jurors, witnesses and counsel, the trial judge directed the bailiff to find four additional prospective jurors from the immediate area. Appellant challenges the lawfulness of this procedure.

In State v. Suarez, 793 P.2d 934 (Utah App. 1990) a challenge was made to the jury selection process when the trial court used jurors which had been excused from

another District Court trial earlier that same day on the basis said jurors were not "randomly drawn from the complete jury wheel". The statute in question, Utah Code Ann. § 78-46-13(4), is the predecessor to Rule 4-404(10) of the Utah Rules of Judicial Administration. This statute provides that if there is "an unanticipated shortage of available trial jurors drawn from a qualified jury wheel, the court may require the clerk of the court to summon a sufficient number of trial jurors selected at random by the court from the qualified jury wheel". The Utah Court of Appeals held the trial judge used proper discretion in utilizing the jurors excused from another case:

> Defendant argues that § 78-46-13(4) gives the trial court two options in the face of a shortage of jurors—to summon jurors from the complete jury wheel or to declare a mistrial. We disagree. Section 78-46-13(4) is couched in permissive terms and appears to give the court some discretion on how to make up a shortage of jurors. Although the court *may* direct the clerk of the court to summon jurors at random from the jury wheel, the statute does not require it to do so. 793 P.2d at 937
>
> ...We hold that the trial court's decision to utilize unused jurors from other courtrooms did not amount to a substantial departure from § 78-46-13(4). The decision to utilize qualified, unused jurors who had been properly called to serve as jurors on that day was a sound exercise of the court's discretion; advanced the interest of judicial economy; and permitted the trial to proceed as scheduled without unnecessary delay to witnesses and counsel or disruption to the court's calendar. Having concluded the statute was substantially complied with, we need not consider the additional requirement under § 78-46-16(2) that 'substantial injustice and prejudice' resulted from the procedure employed by the court. 793 P.2d at 938

The decision of the trial court in the case at bar to locate four additional prospective jurors was within the court's authority under Utah Rules of Judicial Administration 4-404(10) which provides "the court may use any lawful method for acquiring a jury". This language provides more discretion to the trial judge than the former statute analyzed in Suarez. The trial court's decision to locate additional jurors

allowed the trial to proceed as scheduled without unduly delaying the witnesses and jurors or disrupting the court's calendar.

Appellant argues the prospective jurors were all Summit County employees from the same building that houses the trial court and resulted in two Summit County Justice clerks, a Summit County dispatcher and a Summit County Deputy Sheriff being called as prospective jurors. Appellant cites Utah Rules of Criminal Procedure Rule 18(e)(4)(1999) in support of his position that the additional jurors should have been removed from the jury panel for cause. This provision provides:

> (4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted or employed by the state or a political subdivision thereof; (Emphasis added).

The Summit County Deputy Sheriff was excused for cause based on the foregoing Rule. However, the remaining additional jurors indicated they had not dealt with Officer Buchanan before and did not have any opinion as to his creditability. (Tr. 61,62). The two Justice Court clerks were acquainted with both the prosecutor and defense counsel because of their work in and around the Courthouse but were not socially involved with either attorney. (Tr. 43,44) Juror No. 13, the Summit County dispatcher, was recently hired and did not know either counsel and did not dispatch for the Park City Police Department. (Tr. 48,62) Under these circumstances, the trial court properly allowed the two Justice Court clerks and the Summit County dispatcher to remain as part of the jury panel.

Any alleged impropriety in the jury selection process was waived when Appellant's attorney failed to cure any alleged error by exercising his preemptory challenges on Jurors No. 1, 4, and 8, who were all part of the original jury panel. In State v. Baker, 935 P.2d 503 (1997), the Utah Supreme Court addressed the narrow legal question of whether a convicted criminal defendant is entitled to reversal on appeal when the trial court erroneously denied a for-cause challenge and the defendant failed to cure the error be exercising a peremptory challenge against the juror challenged for cause. After a comprehensive analysis, the Utah Supreme Court held:

> We adopt the cure-or-waive rule and hold that in order to preserve the error on appeal, a criminal defendant must exercise a peremptory challenge, if one is available, against the juror unsuccessfully challenged for cause.... 935 P.2d at 510

The trial court exercised proper discretion in seating the additional jurors on the prospective jury panel and in denying Appellant's challenges for cause. However, even if the court committed error in the jury selection process, Appellant failed to cure the error by using his preemptory challenges on the jurors challenged for cause.

II.

THE TRIAL COURT EITHER PROPERLY EXCLUDED EXPERT TESTIMONY ON ALCOHOL ABSORPTION/METABOLISM OR, IF THE TRIAL COURT ERRED IN EXCLUDING SUCH TESTIMONY, THE ERROR WAS HARMLESS.

Mr. Levy's attorney represents on page 12 of his Brief that "Mr. Levy, is being tried under the amended statute, Utah Code Ann. §41-6-44(2)(a)(i) (1999)." This statute provides:

> A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater;

Assuming the foregoing statute is applicable, the Court properly disallowed expert testimony on the defendant's rate of alcohol absorption or metabolism to establish defendant's actual blood alcohol concentration at the time of arrest. Such a ruling is clearly consistent with the foregoing statute and does not invoke an "irrebuttable presumption" as alleged by Appellant. This statute makes it an "element of the crime" to have sufficient alcohol in a person's body that even though it may not be absorbed into the blood or brain at the time of driving, will within two hours of the time of driving bring the person's chemical test to show a blood or breath alcohol concentration of .08 grams or greater. The statute is based on a reasonable and justifiable public policy consideration that a person should not be allowed to consume a quantity of alcohol and then drive hoping to get to their destination before the alcohol is absorbed and causes impairment.

Appellant cites State v. Preece, 971 P.2d 1 (Utah App. 1998) in support of his position that the Court should have allowed testimony regarding the absorptive and metabolic rates of alcohol. Preece construed the former statute which provided:

> A person may not operate or be in actual physical control of a vehicle within this state if the person:
>
> (i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control;

Utah Code Ann. §41-6-44(2)(a)(i) (1999) was enacted to address the Preece decision. This is evidenced by the following language:

> Section 41-6-44(2)(a)(i) of the Utah Code 'prohibits driving or controlling a vehicle with a blood-alcohol level of .08 [grams] or more, not driving or controlling a vehicle when a test shows a level of .08 [grams] or more'. 971 P.2d at 7

The arrest of Mr. Levy occurred on the evening of February 6, 1999 and the trial was held on August 11, 1999. The 1999 Amendment to 41-6-44(2)(a)(i) was not enacted at the time of the offense but was enacted at the time of trial. The record reveals the trial court and both counsel read from 41-6-44(2)(a)(i) as it existed before the 1999 amendment. (Tr. 107, 108, 111, 112).

The undersigned concedes that pursuant to State v. Preece, supra., the expert testimony on the absorption and metabolic rate of alcohol should have been admitted if the pre-1999 statute is applicable to the case at bar. However, Mr. Levy is charged in the alternative with either: (1) Driving while Under the Influence of Alcohol; or (2) Driving with Unsafe Blood Alcohol Concentration. Appellant's attorney specifically requested the jury to make a finding on whether Appellant was guilty of Driving While Under the Influence of Alcohol and Driving with an Unsafe Blood Alcohol Concentration. The supplemental transcript provides:

> MR. D'ELIA: Thank you, your Honor. The very first thing we're addressing at side bar conference to help bring about a (inaudible) verdict given. The verdict was given (inaudible), actually given is do you find the defendant either guilty of driving under the influence or with a blood alcohol content of .08 or greater, and the second one is not guilty of under the influence or .08 or greater.
>
> What I would ask the Court to do is, and I realize the Court will certainly - - has said it will take under consideration that we didn't make a record. I would ask the Court if in case this matter will need to be reviewed for some reason, that in fact we have the bifurcated jury form that the jury would then be able to select specifically whether they find the defendant guilty of being under the influence of alcohol, or .08 or greater, and make them individual so that the jury can mark off

which one of the affirmative counts, or both, that they necessarily found. I submit that as my complete argument, your Honor. (Supp. Tr. 2, Lines 13-25 through Supp. Tr. 3, Lines 1-8)

The Court approved the foregoing request and it instructed the jury as follows:

Ladies of the jury: The Court is back in session and defendant is present, counsel is present. There has been a request by counsel to do the following: If - - if you find the defendant guilty, there are two bases to do so, and counsel for the defendant has requested that with a pen you underline the provision in the verdict form that you find the defendant guilty of. It's in the alternative. "We the jurors in the above-entitled case find the defendant guilty of driving while under the influence of alcohol and/or drugs." If you think that he was guilty of doing that, underline it, if you convict him. Or "we find the defendant guilty of driving with - - or of driving with unsafe blood alcohol concentration." So if you find the defendant guilty, you can underline one or both, if that's the basis of your verdict; or if you find the defendant not guilty, don't even deal with it. (Supp. Tr. 8, Lines 18-25 through Supp. Tr. 9, Lines 1-10)

In the verdict form signed by the foreperson, the guilty verdict is checked and both Driving While Under the Influence of Alcohol and Unsafe Blood Alcohol Concentration are underlined (R. 38). Because Appellant only provided a partial transcript of the trial court proceedings, this Court is unable to review the evidence supporting Mr. Levy's conviction for Driving While Under the Influence of Alcohol and therefore must presume said verdict was supported by admissible and competent evidence. State v. Nine Thousand One Hundred Ninety-Nine Dollars, 791 P.2d 213 (Utah Ct. App. 1990); Sampson v. Richins, 770 P.2d 998 (Utah Ct. App.), cert. denied, 776 P.2d 916 (Utah 1989); Horton v. Gem State Mut., 794 P.2d 847 (Utah Ct. App. 1990); State v. Rawlings, 829 P.2d 150 (Utah Ct. App. 1992). Accordingly, if the pre-1999 statute is applicable any error in not allowing expert testimony is harmless. Harmless error was defined in State v. Robertson, 932 P.2d 1219 (Utah 1997) as follows:

> Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings. *Id.* Put differently, an error is harmful only if the likelihood of a different outcome is sufficiently high that it under mines our confidence in the verdict. *Id.* The burden of showing harmfulness normally rests with the complaining party. *See Ashton v. Ashton*, 733 P.2d 147 (Utah 1987) (citing *Redevelopment Agency v. Mitsui Inv., Inc.*, 522 P.2d 1370, 1374 & n. 12 (Utah 1974)); *see also State v. Bishop*, 753 P.2d 439, 448 (Utah 1988) (holding that 'appellant has the burden of establishing that reversible error resulted from an abuse of discretion'). Robertson has failed to carry this burden. 932 P.2d at 1227.

CONCLUSION

This Court should uphold the jury verdict finding Mr. Levy guilty of Driving While Under the Influence of Alcohol or Driving with Unsafe Blood Alcohol Concentration.

DATED this 14th day of April, 2000.

Terry L. Christiansen
Park City Prosecutor

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Gerry D'Elia, D'ELIA & LEHMER, P.O. Box 626, Park City, Utah 84060, this 14th day of April, 2000.

APPENDIX

1. Jury List

Date: Wednesday, August 11th, 1999

PARK CITY VS. SAMUEL LEVY

Post-it® Fax Note 7671	Date 10/4/99	pages 1
To: Kathy Morgan	From: Janet	
Co./Dept. PKY MT ROT	Co. 3rd DIST PC	
Phone #	Phone # 435-615-3212	
Fax # 801-531-0263	Fax #	

95500254

Attorney(s) for Defendant

KY LIST

~~1~~		LOUIS B. BIGLER III	excused	Park City
~~2~~		SHERMAN A. CULP	excused	Park City
1	3 ✓	KELLY OLSEN DINGER	excused (D)	Park City
USED 2	4 ✓	KATHY JOAN FAWCETT		Henefer (1)
3	5 ✓	HEIDI H. GATCH	excused	Park City
~~6~~		PATRICIA S. HARTLEY	NO Show	Park City
MS/HE) 11	~~7~~ ✓	AGNES A. JOHANSON	excused	Park City
4	8 ✓	CAROL J. LANCE	excused (D)	Kamas
~~9~~		BRUCE A. MANNING	NO Show	Oalkey
5	10 ✓	WAYNE W. MAW	excused (P)	Park City
~~11~~		STEPHANIE NICHOLS	excused	Park City
6	12 ✓	DEREK A. OSBORNE	excused (P)	Park City
7	13 ✓	JACQUELINE R. POWELL	excused	Park City
~~14~~		JOHN L. SPUNG	NO Show	Park City
~~15~~		ROBERT L. STOKES	NO Show	Park City
8	16 ✓	CHRIS A. TOMCZYK (Tomchek)	excused (D)	Park City
~~17~~		ROBIN D. VALLINE	excused	Park City
9	18 ✓	DAVID J WILSON	excused	Park City
10	19 ✓	ROSEANN WOODWARD	excused (P)	Park City
~~20~~		EUGENE O. YOUNG	excused	Park City
USED	21 12	NICOLE Crystal (NICOLE)	12	(2)
	22 13	Carolee Jacobsen	13	(3)
	23 14	Linda Funderburk	14	(4)

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24 15 Thomas W. Judd excused